

**SANITIZED DECISION – DOCKET NOS. 05-334 C, 05-335 FN, 05-336 W & 05-337 N –  
BY ROBERT W. KIEFER, JR., ALJ – SUBMITTED for DECISION on NOVEMBER 5,  
2005 – ISSUED on APRIL 27, 2006**

**SYNOPSIS**

**CORPORATION NET INCOME TAX – BURDEN OF PROOF --** In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment involving corporation net income tax, the burden of proof is upon Petitioner to show that the assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

**CORPORATION NET INCOME TAX – BURDEN OF PROOF –** The taxpayer may satisfy its burden of proving that it does not owe corporation net income tax by presenting evidence sufficient to demonstrate that it was not engaged in business operations in the State of West Virginia during one or more of the years in question, or that it had no net income during one or more of the years in question.

**CORPORATION NET INCOME TAX – BURDEN OF PROOF --** A taxpayer does not satisfy its burden of proof when, for one or more of the years in question, it had gross revenues derived from its business operations, but fails to appear at the evidentiary hearing and offer evidence sufficient to show that the corporation net income tax on its actual net income was less than the amount of corporation net income tax assessed against it by the State Tax Commissioner.

**CORPORATION NET INCOME TAX – BURDEN OF PROOF --** A taxpayer does satisfy its burden of proof when, for one or more of the years in question, it provides evidence to show that it ceased operations prior to the year or years in question, and that it did not have gross revenues derived from business operations for that year or those years.

**BUSINESS FRANCHISE TAX – BURDEN OF PROOF --** In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment involving business franchise tax, the burden of proof is upon Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

**BUSINESS FRANCHISE TAX – BURDEN OF PROOF –** The taxpayer may satisfy its burden of proving that it does not owe business franchise tax by presenting evidence sufficient to show that it did not possess the privilege of engaging in business in the State of West Virginia during one or more of the years in question by, for example, maintaining its corporate existence, or by proving that it was not one of the businesses described in W. Va. Code § 11-23-6(a).

**BUSINESS FRANCHISE TAX – BURDEN OF PROOF --** A taxpayer does not satisfy its burden of proof when it fails to appear at the evidentiary hearing and, for one or more of the years in question, fails to present evidence sufficient to prove that it did not exercise the privilege

of doing business in West Virginia by maintaining its corporate existence and qualifying to do business in West Virginia, or by proving that it was not one of the types of businesses identified in W. Va. Code § 11-23-6(a).

**CONSUMERS' SALES AND SERVICE TAX -- BURDEN OF PROOF --** In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment involving consumers' sales and service tax, the burden of proof is upon Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

**CONSUMERS' SALES AND SERVICE TAX – BURDEN OF PROOF –** A taxpayer may satisfy its burden of proving that it does not owe consumers' sales and service tax by presenting evidence sufficient to show that it did not have gross receipts that were subject to consumers' sales and service tax, or by showing that its gross receipts were exempt from the consumers' sales and service tax.

**CONSUMERS' SALES AND SERVICE TAX – BURDEN OF PROOF --** A taxpayer does not satisfy its burden of proof when, for one or more of the years in question, it had gross receipts, but it does not appear at the evidentiary hearing or offer other evidence sufficient to show that its gross receipts were not subject to the consumers' sales and service tax or that they were exempt from the consumers' sales and service tax.

**CONSUMERS' SALES AND SERVICE TAX – BURDEN OF PROOF --** A taxpayer does satisfy its burden of proof when, for one or more of the years in question, it provides evidence to show that it had ceased operations prior to the year or years in question, and that it had no gross receipts from sales of services or tangible personal property for that year or those years.

**PERSONAL INCOME TAX WITHHOLDING – BURDEN OF PROOF --** In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment involving corporation net income tax, the burden of proof is upon Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

**PERSONAL INCOME TAX WITHHOLDING – BURDEN OF PROOF –** A taxpayer may satisfy its burden of proving that it did not withhold personal income tax from pay of employees by presenting evidence that it did not have employees for the year or years in question.

**PERSONAL INCOME TAX WITHHOLDING – BURDEN OF PROOF --** A taxpayer satisfies its burden of proof when, for one or more of the years in question, it proves that it had no employees and paid no wages during the year or years in question.

## **FINAL DECISION**

A tax examiner with the Field Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) made several attempts to conduct an audit of the books and records of the Petitioner, but was apparently unable to conduct such an audit due to the lack of cooperation by the Petitioner or its representatives. Thereafter, on December 15, 2004, the Director of this Division issued four separate assessments against the Petitioner. Because of lack of cooperation on the part of the Petitioner, the assessments issued by the State Tax Commissioner were estimated.

The first assessment was a consumers’ sales and service tax assessment, issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. The assessment was for the period of January 1, 2001, through December 31, 2003, for tax in the amount of \$, interest in the amount of \$, computed through December 31, 2004, and additions to tax in the amount of \$, for a total assessed consumers’ sales and service tax liability of \$. Written notice of this assessment was served on the Petitioner on April 18, 2005.

The second assessment issued by the Commissioner’s Division was a business franchise tax assessment, issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 23 of the West Virginia Code. The assessment was for the period of January 1, 2001, through December 31, 2003, for tax in the amount of \$, interest in the amount of \$, computed through December 31, 2004, and additions to tax in the amount of \$, for a total assessed business franchise tax liability of \$. Written notice of this assessment was also served on the Petitioner on April 18, 2005.

The third assessment issued by the Commissioner’s Division was a West Virginia personal income tax withholding assessment, issued pursuant to the authorization of the State

Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code. The assessment was for the period of January 1, 2001, through December 31, 2003, for tax in the amount of \$, interest in the amount of \$, computed through November 30, 2004, and additions to tax in the amount of \$, for a total assessed personal income tax liability of \$. Written notice of this assessment was also served on the Petitioner on April 18, 2005.

The fourth assessment issued by the Commissioner's Division was a West Virginia corporation net income tax assessment, issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 24 of the West Virginia Code. The assessment was for the period of January 1, 2001, through December 31, 2003, for tax in the amount of \$, interest in the amount of \$, computed through December 31, 2004, and additions to tax in the amount of \$, for a total assessed corporation net income tax liability of \$. Written notice of this assessment was also served on the Petitioner on April 18, 2005.

Thereafter, by mail postmarked May 27, 2005, received in the offices of the West Virginia Office of Tax Appeals on May 31, 2005, the Petitioner timely filed with this tribunal a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9 [2002].

Subsequently, notice of a hearing on the petition was sent to the Petitioner. The hearing was scheduled for August 23, 2005. The Petitioner's representative requested a continuance of the first hearing on the grounds of his ill health. He further requested additional time in which to provide more complete information. The evidentiary hearing was continued until November 1, 2005. The Petitioner did not request a continuance of the second hearing. There was no appearance on behalf of the Petitioner when the hearing was convened. The hearing was held, however, without an appearance on behalf of the Petitioner or the Commissioner, in accordance

with the provisions of W. Va. Code § 11-10A-10(a) [2002] and W. Va. Code St. R. § 121-1-69.1 (Apr. 20, 2003).

### **FINDINGS OF FACT**

1. For each of the years 2001, 2002 and 2003, the State Tax Commissioner assessed corporation net income tax against the Petitioner in the amount of \$, plus interest of \$, and additions to tax for “negligence” of \$.

2. With respect to the assessment for corporation net income tax, in the Petitioner’s petition for reassessment, the president of the Petitioner asserted that, because of his medical problems, the business ceased operations in the year 2002. It further asserted that a tax professional, identified as , an accountant, would file corporation net income tax returns for the years 2001 and 2002, based on actual data.

3. There is no evidence to show that the Petitioner ever prepared and filed corporation net income tax returns for 2001 or 2002.

4. With respect to the assessment for corporation net income tax for the year 2003, the Petitioner furnished a copy of a return with its petition for reassessment that showed that it was inactive and, therefore, had neither gross receipts nor net income for 2003.

5. For 2001, the State Tax Commissioner did not assess the Petitioner for business franchise tax.

6. For each of the years 2002 and 2003, the State Tax Commissioner assessed business franchise tax against the Petitioner in the amount of \$, plus interest of \$, and additions to tax for “negligence” of \$.

7. With respect to the assessment for business franchise tax, in the Petitioner’s petition for reassessment, its president asserted that, because of his medical problems, the business

ceased operations in the year 2002. It further asserted that a tax professional would prepare and file business franchise tax returns for the years 2001, 2002 and 2003.<sup>1</sup>

8 There is no evidence to show that the Petitioner filed business franchise tax returns for any of the years 2001, 2002 or 2003.

9. For 2001, the State Tax Commissioner did not assess the Petitioner for consumers' sales and service tax.

10. For each of the years 2002 and 2003, the State Tax Commissioner assessed consumers' sales and service tax in the total amount of \$ against the Petitioner.

11. With respect to the assessment for consumers' sales and service tax, in the Petitioner's petition for reassessment, the president of the Petitioner asserted that, because of his medical problems, the business ceased operations in the year 2002. It further provided West Virginia consumers' sales and service tax returns for the years 2001, 2002 and 2003

12. For 2001, the consumers' sales and service tax return provided by the Petitioner shows that it had gross sales in the amount of \$, all of which were declared as tax exempt. The Petitioner offered no reason to support its declaration that its sales were tax exempt in their entirety.

13. For 2002, the consumers' sales and service tax return provided by the Petitioner shows that it had gross sales in the amount of \$, all of which were declared as tax exempt. The Petitioner offered no reason to support its declaration that its sales were tax exempt in their entirety.

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<sup>1</sup> Since the taxpayer was not assessed business franchise tax for 2001, there was no need to file a return for that year.

14. For 2003, the Petitioner maintained that it had no gross receipts<sup>2</sup> on which it was required to collect consumers' sales and service tax, because it was no longer in business, having ceased operations in 2002 because of its president's health problems.

15. For 2001 and 2002, the State Tax Commissioner did not assess the Petitioner for personal income tax withheld from its employees.

16. For 2003, the State Tax Commissioner assessed the Petitioner for personal income tax withheld from its employees in the total amount of \$.

17. With respect to the assessment for personal income tax withholding, in the Petitioner's petition for reassessment, the president of the Petitioner asserted that, because of his medical problems, the business ceased operations in the year 2002. It further provided Forms W-3, "Transmittal of Wage and Tax Statements," for the years 2001 and 2002.

18. For 2001, the Form W-3, which was filed by the Petitioner on or about February 1, 2002, shows that it withheld a total of \$ in state income tax from the wages of its employees.

19. The Petitioner also attached Forms W-3 Wage and Tax Statements for all of its employees for the year 2001, which clearly confirm that the Petitioner withheld a total of \$ in state income tax from its employees.

20. For 2002, the Form W-3, which was filed by the Petitioner on or about January 30, 2002, shows that it withheld a total of \$ in state income tax from the wages of its employees.

21. The Petitioner also attached Forms W-3 Wage and Tax Statements for all of its employees for the year 2002, which clearly confirm that the Petitioner withheld a total of \$ in state income tax from its employees.

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<sup>2</sup> The return said "no activity."

22. With respect to the assessment for personal income tax withheld from its employees, the Petitioner maintains that it had no employees for the year 2003, because it had ceased operations due to its president's health problems.

23. Having ceased operations in 2002, for 2003 the Petitioner had no employees and paid no wages from which it withheld any personal income tax.

24. The Petitioner was provided with notice that he was required to appear at the evidentiary hearing and present evidence respecting the reasons he believed that the assessment was erroneous, unlawful, void or otherwise invalid.

25. The Petitioner did not appear at the time and place of the hearing and presented no evidence at the evidentiary hearing respecting any of his allegations.

## **DISCUSSION**

### **Corporation Net Income Tax**

The first issue presented by this matter is whether the Petitioner has demonstrated that it should be relieved from all or any part of the assessment against it for corporation net income tax. The taxpayer was assessed corporation net income tax for each year of the audit period. In its petition, the Petitioner asserted that it ceased operations in 2002, and that it had not conducted any operations in 2003 which would have led to its earning any net income. It provided a corporation net income tax return for the year 2003, which showed that it was inactive. The Petitioner further indicated that it would file corporation net income tax returns for each year of the audit period. However, so far as it can be determined, the Petitioner did not file any additional corporation net income tax returns.



This Office is convinced that the Petitioner conducted no operations in 2003 and, consequently, had no net income for that year. This is evidenced by the Petitioner's 2003 corporation net income tax return, filed with its petition for reassessment of that tax, which showed that it was inactive for that year, and its 2003 consumers' sales and service tax return, filed with its petition for reassessment of that tax, which also showed that it had no activity for that year. The fact that the Petitioner's gross receipts, as shown on its 2002 consumers' sales and service tax return, dropped precipitously from the prior year,<sup>3</sup> is evidence that the Petitioner ceased operations in 2002. Further evidence that the Petitioner ceased operations in 2002 is the fact that its payroll for 2002 was between 13.5% and 14% of its payroll for 2001. Its two highest paid employees, including its president, received only 22% of the wages they received for the prior year. This evidence causes this Office to conclude that the Petitioner ceased operations in 2002, and that it had no net income for 2003. Therefore, the assessment for 2003 must be abated.

The Petitioner has not provided corporation net income tax returns for either 2001 or 2002 which show its actual net income. There is nothing in any of the documents provided by the Petitioner from which this Office can determine the Petitioner's actual net income for those years. The Petitioner has done nothing to satisfy its burden of proving that the assessment is erroneous or otherwise invalid. Therefore, this Office has no choice but to affirm the assessment as is relates to both of those years.

#### Business Franchise Tax

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<sup>3</sup> The Petitioner's gross receipts for 2002 were only slightly more than half of its gross receipts for 2001.

As was discussed with respect to the corporation net income tax, this Office is of the opinion that the Petitioner did conduct operations in the year 2002, but it did not conduct operations in the year 2003.

W. Va. Code § 11-23-6 provides, in relevant part:

(a) *General.* – An annual business franchise tax is hereby imposed on the privilege of doing business in this state and in respect of the benefits and protection conferred. Such tax shall be collected from every domestic corporation, every corporation having its commercial domicile in this state, every foreign or domestic corporation owning or leasing real or tangible personal property located in this state or doing business in this state and from every partnership owning or leasing real or tangible personal property located in this state or doing business in this state, . . .

The language of the statute makes it clear that the tax is imposed on the “privilege” of doing business in the State of West Virginia. The statute does not require that a taxpayer actually exercise that privilege, except insofar as it imposes the tax only on those entities described in the statute. Therefore, if the Petitioner is one of the corporations described in the statute, it is subject to the tax regardless of whether or not it exercises the privilege of doing business in this State.

The taxpayer has the burden of proving that the assessment in this matter is incorrect. *See* W. Va. Code § 11-10A-10(e). Stated differently, the assessment in this matter is presumed to be correct. Consequently, it must be presumed that the Petitioner is one of the corporations described in the statute, unless it satisfies its burden of proving otherwise. The Petitioner did not appear at the hearing in this matter and offered no evidence to show that it is not one of the corporations described in the statute. Therefore, it has not satisfied its burden of proof and it is subject to the business franchise tax. Consequently, the assessment must be affirmed.

#### Consumers’ Sales and Service Tax

The third issue presented by this matter is whether the Petitioner has demonstrated that it should be relieved from all or any part of the assessment against it for consumers’ sales and

service tax. The Tax Commissioner assessed consumers' sales and service tax for the years 2002 and 2003. He did not assess tax for 2001. In its petition, the Petitioner asserted that it ceased operations in 2002, and that it conducted operations in 2003.

The Petitioner filed consumers' sales and service tax returns for all three years of the audit period. Since the Petitioner was not assessed tax for 2001, there is no need to consider the return for that year.

The return filed by the Petitioner for 2002 shows that it had gross sales in the amount of \$, all of which were declared as tax exempt. The Petitioner offered no proof to support its declaration that its sales were tax exempt in their entirety. Since the taxpayer has not offered any reason why its gross sales for 2002 were tax exempt, either in whole or in part, it must be presumed that all of its sales were taxable.

Assuming that all of the Petitioner's gross sales for 2002 were taxable, the Petitioner would have been required to collect consumers' sales and service tax in the amount of \$. However, the State Tax Commissioner only assessed tax in the lesser amount of \$. Because the Tax Commissioner assessed an amount that is less than the amount which the evidence shows should have been collected and remitted, this Office is limited to affirming the assessment in the lesser amount.

With respect to 2003, as more fully set forth above, the Petitioner has shown that it ceased operations in 2002. The consumers' sales and service tax return filed by the Petitioner for 2003, which shows that it had no sales for 2003, is consistent with the other evidence and documents presented by it. Therefore, the assessment for 2003 must be abated.

#### Personal Income Tax Withholding

The State Tax Commissioner issued an assessment against the Petitioner for personal income tax it withheld from the pay of its employees. The assessment was only for the year 2003, and was in the amount of \$, which was the approximate amount that it withheld from its employees for the year 2001.

As set forth in greater detail above, the Petitioner ceased operations in 2002. The Petitioner's records respecting the amount of personal income tax it withheld from its employees clearly demonstrates this. The wages paid to its employees for 2002 were approximately 13.5% to 14% of the wages paid in 2001. This is clearly indicative of a cessation of operations early in 2002.

Since the evidence shows that the Petitioner ceased operation in 2002, the Petitioner's argument that it had no employees in 2003 is supported by the evidence. Thus, the assessment for personal income tax withheld from its employees should be abated.

#### Additions to Tax for "Negligence"

The final issue presented in this action is whether the Petitioner is entitled to abatement of the additions to tax assessed for negligence or intentional disregard of rules and regulations.

Additions to tax may be assessed in the case of any underpayment of tax that is due to negligence on the part of the taxpayer, or where a taxpayer intentionally disregards any rules or regulations respecting any tax administered under the Tax Procedures Act. W. Va. Code § 11-10-18(c). W. Va. Code § 11-10-18(c) provides:

(c) *Negligence or intentional disregard of rules and regulations.* -- If any part of any underpayment of any tax administered under this article is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the amount of tax due five percent of the amount of such tax if the underpayment due to negligence or intentional disregard of rules and regulations is for not more than one month, with an additional five percent for

each additional month, or fraction thereof during which such underpayment continues, not exceeding twenty-five percent in the aggregate: *Provided, That these additions to tax shall be imposed only on the net amount of tax due and shall be in lieu of the additions to tax provided for in subsection (a), and the tax commissioner shall state in his notice of assessment the reason or reasons for imposing this addition to tax with sufficient particularity to put the taxpayer on notice regarding why it was assessed.* (Emphasis added.)

When the Commissioner determines that the taxpayer has been negligent, or has intentionally disregarded rules or regulations, additions to tax may be assessed at 5% per month, up to a maximum amount of 25%.

In an attempt to comply with the requirement in W. Va. Code § 11-10-18(c) that the notice of assessment state the reasons for imposing negligence additions to tax, the notice of assessment for corporation net income tax stated, “Additions to tax have been imposed due to negligence and the fact that you materially under reported and/or under remitted corporate net income tax. After repeated attempts by the tax auditor requesting records, you did not respond.” The notice of assessment for business franchise tax stated, “Additions to tax are being imposed under 11-10-18c [sic] of the WV Code due to negligence or intentional disregard of rules and regulations (but without intent to defraud) because you materially under reported and/or under remitted business franchise tax by 100.00 [sic].” The notice of assessment for consumers’ sales and service tax stated, “Additions to tax are being imposed under 11-10-18c [sic] of the WV Code due to negligence or intentional disregard of rules and regulations (but without intent to defraud) because after repeated attempts to contact you to make arrangements to audit your records, you did not respond and you have not filed required reports timely.”<sup>4</sup>

This Office must begin by noting that the State Tax Commissioner appears to justify the assessment of additions to tax on the corporation net income tax and the consumers’ sales and

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<sup>4</sup> Since the assessment for personal income tax withheld from employees has been abated, this Office need not consider the necessity of a waiver of additions to tax for that assessment.

service tax assessments by asserting that the Petitioner failed to respond to several requests that the Petitioner provide its books and records for examination by the Commissioner. This does not constitute grounds for assessment of negligence additions under W. Va. Code § 11-10-18(c).

W. Va. Code § 11-10-18(c) provides that additions to tax may imposed under that section if “any part of any underpayment of any tax administered under this article is due to negligence or intentional disregard of rules and regulations (but without intent to defraud).” The failure of the Petitioner to respond to a request to provide its records for examination in connection with an audit is not the reason for any part of any underpayment of the taxes for which the Petitioner was assessed. Any underpayment of the taxes in question occurred during the years in question, or at the time that the Petitioner filed returns and failed to pay the tax due, or when it failed to file returns. Acts of this nature certainly occurred prior to any request to examine the books and records of the Petitioner.<sup>5</sup> Since the Legislature has not expressly provided that additions to tax are to be added to an assessment because a taxpayer refuses to comply with a request to submit to an audit, this is not a valid reason for imposition of additions to tax for “negligence.”

Insofar as the notices of assessment can be read as attempts to impose additions to tax for intentional disregard of rules and regulations, they also fail to satisfy the statute. In order to impose additions to tax under this section, the State Tax Commissioner must state his reasons therefor “with sufficient particularity to put the taxpayer on notice regarding why [they were] assessed.” This requires the Tax Commissioner, at a minimum, to identify the particular rule or regulation that the Petitioner violated. Otherwise, the Petitioner would not be given any notice of the rule or regulation that it purportedly violated.

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<sup>5</sup> This is certainly the case here, where the Petitioner ceased operations in 2002 and had no tax liability for 2003. Consequently, there was no underpayment for 2003.

Although stated differently in each of the notices of assessment, an additional grounds for the assessment of negligence additions to tax are the Petitioner's failure to file returns and to pay tax due and owing, as provided by W. Va. Code § 11-10-18(a)(1) & (2).

As stated above, the Tax Commissioner must comply with the requirements of § 11-10-18(c). That subsection requires the Tax Commissioner to "state in the notice of assessment the reason or reasons for imposing this addition to tax with sufficient particularity to put the taxpayer on notice regarding why it was assessed."

The reason for this requirement seems apparent. Due process requires that the taxpayer receive notice of the basis of the assessment. In the "usual" situation where there is a "mere" failure to file or failure to pay, the taxpayer knows that it has either failed to file its returns, failed to pay the tax, or both. When the Tax Commissioner assesses additions to tax, the audit workpapers put the taxpayer on notice as to whether the assessment is for failure to file or failure to pay, based on the amount of additions assessed.<sup>6</sup> It is in the less common situation, where the taxpayer is purportedly negligent or where it purportedly disregards rules and regulations, that the taxpayer must be notified with particularity of the exact conduct with which it is charged, so that it may have the opportunity to appear at the hearing fully prepared to address the allegations, if it so desires.

In the present matter, the reason articulated in the audit workpapers does not, by itself, specify any act of negligence on the part of the Petitioner that might support the assessment of an addition to tax for negligence pursuant to W. Va. Code § 11-10-18(c). Instead, it merely states that the taxpayer under reported (failed to file returns) or under paid (failed to pay) the various taxes for which it was assessed. These appear to be nothing more than actions for which

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<sup>6</sup> If the additions to tax are assessed at 5% per month, the taxpayer should know that they are assessed for failure to file. If they are assessed at .5% per month, then the taxpayer knows they are assessed for failure to pay.

additions to tax may be assessed pursuant to W. Va. Code §§ 11-10-18(a)(1) & (2). These reasons, by themselves, do not rise to the level of negligence. In order to demonstrate that the Petitioner was negligent, the Tax Commissioner must come forward with some evidence sufficient to make at least a *prima facie* showing of negligence on the part of a taxpayer.

This tribunal concludes that requiring the Tax Commissioner to come forward with evidence sufficient to make at least a *prima facie* showing of negligence on the part of a taxpayer is not contrary to W. Va. Code § 11-10A-10(e) [2002] or W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003), which place the burden of proof on the taxpayer to prove that the assessment is incorrect. In other circumstances, where the Tax Commissioner presents the assessment and audit workpapers, he has presented evidence which constitutes at least a *prima facie* showing of the amount of tax due, plus interest thereon. He has also presented evidence demonstrating that the taxpayer has either failed to file tax returns or failed to pay tax due and owing. The assessment and the audit workpapers, taken together, constitute evidence of the taxpayer's actions that give rise to the assessment.

The same is not true with respect to an assertion of negligence. Where the Tax Commissioner intends to assert that the taxpayer was negligent or intentionally disregarded rules and regulations, the audit workpapers and the assessment, standing alone, do not constitute evidence of negligence.<sup>7</sup> If this were not the case, mere failure to file or failure to pay would always constitute negligence.

In this matter, the Tax Commissioner assessed additions to tax against the Petitioner because, in his view, the Petitioner was negligent. However, the Tax Commissioner failed to

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<sup>7</sup> They can constitute proof of a taxpayer's failure to file or failure to pay, since those actions on the part of a taxpayer are apparent from the face of the audit workpapers, and those are facts that may be objectively determined. On the other hand, negligence is not apparent from the audit workpapers, and negligence is a more subjective determination.



give the Petitioner adequate notice of the grounds for asserting that it was negligent, as required by W. Va. Code § 11-10-18(c), and failed to provide any evidence to show that the Petitioner was negligent. Consequently, the Petitioner, under these circumstances, is entitled to an abatement of the additions to tax assessed pursuant to W. Va. Code § 11-10-18(c).

### **CONCLUSIONS OF LAW**

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. With respect to the assessment for corporation net income tax for 2001 and 2002, the Petitioner has not satisfied its burden of proof, because it admits that it had income from business operations for those years, but it failed to show the actual amount of its net income for those years.

3. With respect to the assessment of corporation net income tax for 2003, the Petitioner proved that it ceased operations in 2002, and that it had no revenue or net income for the year 2003, thereby proving that the assessment for the year 2003 must be abated.

4. With respect to the assessment for business franchise tax for 2002 and 2003, the Petitioner failed to prove that it no longer possessed the privilege of doing business in the State of West Virginia, or that it was one of the businesses identified in W. Va. Code § 11-23-6(a).

5. With respect to the assessment for consumers' sales and service tax for 2002, the Petitioner has not satisfied its burden of proving that its gross receipts for that year were not

subject to consumers' sales and service tax or that they were exempt from the consumers' sales and service tax.

6. With respect to the assessment for consumers' sales and service tax for 2003, the Petitioner satisfied its burden of proof by showing that it ceased operations in 2002 and, therefore, that it did not have any gross receipts in 2003 that could have been subject to consumers' sales and service tax.

7. With respect to the assessment for personal income tax withheld from the pay of employees for 2003, the Petitioner satisfied its burden of proof by showing that it ceased operations in 2002 and, therefore, that it did not have any employees or pay any wages in 2003 from which it could have withheld any personal income tax.

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the West Virginia corporation net income tax assessment issued against the Petitioner for the period of January 1, 2001, through December 31, 2003, for tax in the amount of \$, interest in the amount of \$, computed through December 31, 2004, and additions to tax in the amount of \$, totaling \$, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for **revised** tax in the amount of \$ and interest, on the revised tax, in the amount of \$, computed through December 31, 2004, for a total current corporation net income tax liability of \$; the additions to tax are, however, **VACATED** in full.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the business franchise tax assessment issued against the Petitioner for the period of January 1, 2001, through December 31, 2003, for tax in the amount of \$, interest in the amount of \$, computed through December 31, 2004, and additions to tax in the amount of \$,

totaling \$, should be and is hereby **AFFIRMED** as to the tax in the amount of \$ and interest in the amount of \$, computed through December 31, 2004, for a total current business franchise tax liability of \$. However the additions to tax, in the amount are **VACATED** in full.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that consumers' sales and service tax assessment issued against the Petitioner for the period of January 1, 2001, through December 31, 2003, for tax in the amount of \$, interest in the amount of \$, computed through December 31, 2004, and additions to tax in the amount of \$, totaling \$, should be and is hereby **MODIFIED** in accordance with the above Conclusions of Law for **revised** tax in the amount of \$ and interest, on the revised tax, in the amount of \$, computed through December 31, 2004, for a total current consumers' sales and service tax liability of \$; the additions to tax are, however, **VACATED** in full.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the West Virginia personal income withholding tax assessment issued against the Petitioner for the period of January 1, 2001, through December 31, 2003, for tax in the amount of \$, interest in the amount of \$, computed through November 30, 2004, and additions to tax in the amount of \$, totaling \$, should be and is hereby **ABATED**.